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80-6877

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JAMES MESSER, JR.,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the denial of State-paid independent psychiatric services violated the Sixth Amendment, or the Due Process Clause or Equal Protection Clauses of the Fourteenth Amendment?

2. Whether the petitioner was deprived of an impartial jury in violation of the Sixth and Fourteenth Amendments or subjected to a capital sentencing decision so infected by passion and emotion as to violate the Eighth or Fourteenth Amendments?

   a. Whether petitioner was unconstitutionally convicted and sentenced to death by a jury that was biased by pre-trial publicity?

   b. Whether an outburst by the victim's father during trial had the effect of unconstitutionally injecting passion and emotion into the capital sentencing decision?

   c. Whether the pre-trial publicity and the outburst of the victim's father had a cumulative effect upon the jury, rendering impossible a fair trial and a capital sentencing decision based on reason rather than passion and emotion?

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner James Messer, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ___ Ga. ___, 276 S.E.2d 15 (1981), and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 3, 1981. A timely petition for rehearing was denied on March 18, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> " In all criminal prosecutions,the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner James Messer, Jr. was convicted and sentenced to death by a Polk County, Georgia jury in February of 1980, for the murder of his eight year old niece, Rhonda Tanner.

The State presented evidence showing that Rhonda Tanner was picked up at school on February 13, 1979, by a person who stated that he was the girl's uncle (T. 202-06) and who was later identified as the petitioner (by means of a photo array) by the principal of Rhonda Tanner's elementary school, Samuel Brabson (T. 207-08), and two other witnesses from the school (T. 219, 224, 227). The body of Rhonda Tanner was found in a wooded area (T. 331-32), and medical evidence showed that she had been stabbed and beaten (T. 461-68). The petitioner made a statement to the police, confessing that he had driven his niece to the woods, sexually molested her without having attempted to

have intercourse, and then hit and stabbed her. (T. 341, 370-71, 384, 402-05, 502). Petitioner was convicted of murder and kidnapping with bodily injury(Ga. Code Ann. §27-2534.1(b)(2))and murder that is outrageously or wantonly vile, horrible, or inhuman (Ga. Code Ann. §27-2534.1(b)(7)).

Approximately a month after petitioner's arrest for this offense, he was examined at the order of the court by psychiatrist Louis Jacobs at Central State Hospital in Milledgeville, Georgia. See R. 111. In a letter to the court dated April 20, 1979, Dr. Jacobs reported his conclusions that petitioner was competent to stand trial and that he was not legally insane at the time of the offense. Id. Subsequently, petitioner's counsel announced to the court his intention to present a psychiatric defense and requested an independent psychiatric examination at government expense. See Transcript of Motion --Special Plea of Insanity, at pages 3-4 [hereafter cited as Insanity Plea Hearing].[1/] Thereafter, on December 14, 1979, petitioner's counsel formally filed a "Special Plea of Insanity" pursuant to Ga. Code Ann. §27-102, see R. 21, and a "Motion for Private Psychiatric Examination of the Defendant at the Government's Expense." R. 22. In the Motion, counsel affirmed "on information and belief that certain psychiatric problems will arise during the course of the preparation and defense of this case," and that "[t]he defendant's financial situation is such that it would impose an undue hardship upon him to finance private psychiatric testimony." Id. Counsel informed the court that he was seeking an independent assessment of petitioner's competency to stand trial. Insanity Plea Hearing 3. The record indicates that petitioner's

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1 / The transcript of these requests apparently was not included in the record below, and the record does not reflect the date on

Cont'd.

counsel also sought to gain an independent evaluation of petitioner's sanity at the time of the offense. See R. 114.

At the first hearing on the plea of insanity on December 18, 1979, the trial court indicated that it was leaning in favor of granting petitioner's Motion. See Insanity Plea Hearing, at pages 4-5.[2/] However, on December 20th, the court issued an order denying the Motion. R. 24. In a subsequent hearing, the court explained:

> There are two points involved in a determination concerning an examination of a defendant for trial. One is whether or not the defendant is capable of standing trial, the other relates to his mental condition at the time of the alleged offense. I overruled your motion for a private psychiatric examination now or shortly prior to this time because there was in my mind insufficient basis for requiring an examination at this time of this defendant. The only reason for a current examination would be concerning his ability to stand trial. The examination previously would have been closer to the time of the offense and would have certainly been, and was, directed toward his mental condition at that time, so I see no reason to grant an examination now by the facility at the state hospital to re-examine at a more distant time his mental condition at the time of the alleged offense. So the only purpose of an examination now would be concerning his ability to stand trial and very frankly there is nothing before me to indicate that he is not able to. There is nothing indicating that he is not able to stand trial.

1/ cont'd.

which these requests were first made. However, statements made in the Insanity Plea Hearing, which took place on December 18, 1979, show that the requests were made at some time prior to that hearing. See Insanity Plea Hearing 3-4.

2/ Petitioner's counsel and the court engaged in the following discussion concerning the court's earlier statements about the request (which apparently were not included in the transcript):

> Counsel: . . .we respectfully urge that it is absolutely necessary that an independent psychiatrist be allowed to examine him, and we would so urge the court to have that done. If I understood the court's ruling previously, the court was not adverse to that.
>
> The Court: Well, I wasn't necessarily a hundred percent in favor of it either.

Insanity Plea Hearing 4. The court stated, in explaining that it was deferring consideration of petitioner's request until a later time: "So the psychiatric examination if one were granted, I

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Insanity Plea Hearing 9. The court, thereafter, reconsidered the matter and on January 17, 1980, ordered that petitioner "be returned to the state facility at Milledgeville for a further examination to determine his capability to assist with and stand trial on the charges against him." R. 30. At the State Hospital, petitioner was again examined by Dr. Louis Jacobs, who again found petitioner competent to stand trial. R. 112-13.

Petitioner also filed a Motion for Change of Venue on the ground of prejudicial publicity. R. 5-6. In a pre-trial hearing on this Motion on December 6, 1979, petitioner introduced into evidence a loose leaf folder containing newspaper articles relating to the killing of Rhonda Tanner and petitioner's pending trial for the killing. (Venue Change Motion Hearing Exhibit D-1)(hereafter D-1). These articles spanned the period from the week of the killing (e.g., D-1, at page 1) to the week of the Motion Hearing (e.g., D-1,at page 59)("Messer Trial Locale to be Decided Today"). The articles included:

(1) Several articles emphasizing the personal tragedy and loss of Rhonda Tanner's parents. See D-1, at pages 11, 16, 20, 21, 26, 28-30, 31. See, e.g., D-1, at page 20 (large picture of Rhonda Tanner's father with his young son on his lap, with the accompanying caption, "Wayne Tanner . . . Talks About his Agony," and the headline "Passions run deep as Arrest of Girl's Young Uncle Deals Double Blow to Tanner Family"); D-1, at page 26 (depicting the mother crying as Rhonda Tanner's coffin is lowered into the grave).

2/ cont'd.

would want . . . I would think it would be more beneficial to the jury to have it closer to the trial. It might be that another examination by the state facility would be warranted also. Insanity Plea Hearing 5 (emphasis added: ellipses in original).

(2) Articles describing the killing of Rhonda Tanner as a tragedy for the entire town of Cedartown, Polk County. See, e.g. D-1,at pages 21-22 (Headline "Death of 8-year-old shocks Cedartown," with the interior of the article explaining that "[i]n this textile town of 10,000 citizens in the hills of northwest Georgia, passions run deep, bred of a strong sense of family and neighborliness"); D-1, at page 26 (Headline "Slain Girl Lowered into Grave: 'A Terrible Dream' for Town").

(3) Several articles relating to a special fund begun by the community to provide money to the parents of Rhonda Tanner for the funeral. See D-1, at pages 5, 11, 16, 26, 33. One of these articles describing the fund features side-by-side photographs of the petitioner and the slain girl. D-1, at page 11. The articles also included a letter from Rhonda Tanner's parents thanking the community for the fund and other aid provided to them. D-1, at page 16.

(4) Articles containing quotations of impassioned statements by relatives of the slain girl. See D-1, at page 22 (quoting one relative as saying "It was just awful what they done to her. It was the worst thing I ever saw."; and quoting another relative as saying "He's gotta be killed and I want to be the one to do it.")

(5) Articles quoting at length the statements of one of the State's key identification witnesses, Principal Samuel Brabson, essentially presenting the substance of the matters to which Mr. Brabson would subsequently testify at trial. See D-1, at page 10; see also id. at pages 2, 3, 22, 30.

(6) Articles recounting police officers' reports that petitioner James Messer had confessed to committing the killing. See D-1, at pages 21, 26.

In the hearing on the Motion to Change Venue, a staff attorney in the firm that initially represented petitioner testified that during the time that the firm was known to be

representing petitioner, approximately thirty to fifty people from the community made comments to her about the case and their belief in the petitioner's guilt. Venue Hearing 17-18, 21-25. Two local police officers testified that the case had received quite a bit of publicity in the community. Id. at 44-45, 60. A local court clerk whose job is to deal with people inquiring into matters taking place in the courthouse (id. at 82-83) testified that the citizens who inquired about this case were aroused and angry. Id. at 83-84.

In the voir dire of jurors, forty-eight venirepersons were examined and, with the sole exception of one person, all of the people in the venire acknowledged knowing something about the facts of the case from radio, television, or newspaper accounts or from having heard conversations in the community about the case. T. 30, 32, 37-38, 40-47, 61-62, 67-70, 77, 84-88, 117, 130-131. The venire included four persons who had contributed money to the funeral fund for Rhonda Tanner. T. 49, 75, 137. Four jurors had to be disqualified because they had formed unshakeable opinions about the case or otherwise could not be impartial in judging petitioner. T. 27-29, 52, 84-88, 128-29. And, even among the jurors who were not disqualified, there were jurors who acknowledged that the publicity could have an effect on their decisionmaking. See, e.g., T. 42, 62-67, 90-92.

In the course of the trial, during the State's direct examination of one of the police officers, the father of Rhonda Tanner interrupted the proceedings with an emotional outburst. The officer had just testified that petitioner "said that he didn't try to have intercourse with her [Rhonda Tanner] because he didn't want to hurt her. I asked him if he took off his clothes . . . " T. 371. The record shows that the following then occurred in the courtroom:

> "(At this point and time the court was disrupted by someone in the audience which was later identified as Mr. Tanner, the father of

> Rhonda Tanner, which [sic] was raging and lunging forward towards the defendant, and at this time a State Trooper along with other officers seized Mr. Tanner)
>
> Mr. Tanner: . . . He . . . He'll pay! You're liable . . . You'll pay. You'll pay. You're liable. Oh ! What you think . . . oh you . . . you're going to get it . . . you . . ."
>
> The Court: Let the jury go out to the jury room.
>
> (The jury leaves the box.)
>
> (Mr. Tanner was taken out of the court room by the officers.)

T. 371-72 (ellipses in original). Petitioner's counsel at that point moved for a mistrial based on the outburst. T. 372. After extensive discussion outside the presence of the jury, the trial court decided to defer ruling on the motion until the jury had been brought back in and instructed concerning the outburst. T. 378.

The words and actions of the jurors during this period that they were in the jury room immediately after the outburst were later revealed in a hearing on a Motion for a New Trial on May 13, 1980. Although some jurors remembered the entire panel remaining silent (Motion for New Trial -- Transcript 54) [hereafter New Trial Hearing], and all of the jurors signed affidavits attesting to their silence prepared by the prosecutor and presented to them by police officers (New Trial Hearing 4, 6; R. 90-101), several of the jurors admitted that there had been conversations about the outburst. Juror James Perkins testified at the hearing that "we had this one lady on the Jury there that was kind of upset about it and we tried to calm her down." New Trial Hearing 83. Juror Charles Russell recalled that "somebody might have said that they could see how he would have an outburst like he did if it had been their kid, but I mean it wasn't discussed at length or nothing." Id. at 96. Juror Annie Lee Cauthen stated: "that's what I remember discussing, the shock that happened." Id. at 136. Juror Charles Russell

moreover recalled that while the jurors were in the jury room, they were able to see Rhonda Tanner's father sitting on the courthouse steps, the place to which he had been removed after the outburst. Id. at 93-94.

In addition to juror Perkins' description of the female juror's agitation and juror Russell's description of a juror expressing sympathy, several of the jurors testified about their own immediate reactions to the outburst. Juror Annie Lee Cauthen testified that: "it was a shuddering thought because we were . . . I was looking this way and then when I . . . when it happened it was just a fright, and that's what I remember about it." Id.at 13 (ellipses in original). Juror Edna Sutton, who was identified as the person who had to be calmed down, recalled that: "it was a terrible terrible thing to me." Id. at 113. Juror Charles Russell observed that: "it just excites anybody for somebody to jump up and have an outburst and a couple of people carry you off." Id.at 95.

When the jury was brought back into the court room, the judge instructed the jurors that they should "disregard completely any passion or demonstrations shown by this father" and should "act only on the evidence as produced to you either by physical evidence or from some testimony from the stand and not from any outburst by a member of a family." T. 379.[3/] The judge then requested that the jurors inform the court if they felt that the outburst would affect their verdict, and there was no response from any of the jurors. Id. At another point in the proceedings, the trial court again instructed the jury to disregard the father's outburst and again inquired of the jurors

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3/ The jury would have known that the person causing the disruption in the courtroom was the father of the slain girl, because he had previously testified. See T. 161-63.

whether the outburst would influence their decisionmaking and once more did not receive any response from any of the jurors. T. 500. In the hearing on the petitioner's Motion for a New Trial, the trial judge inquired of each juror whether the outburst had affected the juror's decisionmaking, and each juror responded in the negative. New Trial Hearing 67-68, 77-78, 87-88, 98-99, 108, 117-18, 125, 132, 139-40, 146-47, 156.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to trial, petitioner filed a "Motion for Private Psychiatric Examination of the Defendant at the Government's Expense." R. 22. In the Motion, petitioner announced his intention to pursue a psychiatric defense and explained that his "financial situation is such that it would impose an undue hardship upon him to finance private psychiatric testimony." Id. The Motion called for an independent State-paid psychiatric examination "in order to insure . . . a fair trial and due process of law under the Constitutions of the United States and Georgia." Id. The trial court denied the Motion, R. 24, explaining that "there is nothing before me to indicate" that petitioner was incompetent to stand trial, and that an examination conducted ten months after the offense could not shed any new light on the earlier State Hospital evaluation of petitioner's "mental condition at the time of the alleged offense." Insanity Plea Hearing 9. The court thereafter issued a supplemental order, ruling that petitioner should be examined for a second time at the State Hospital to determine his competency to stand trial. R. 30.

On appeal to the Supreme Court of Georgia, petitioner argued that the trial court's denial of expert psychiatric assistance violated due process and equal protection. Brief of Appellant at 11. The Georgia Supreme Court rejected this claim, holding that "[t]he grant or denial of a motion for

independent psychiatric evaluation lies within the discretion of the trial court . . . [w]e find no abuse of discretion in denying an independent psychiatric examination in this case." Messer v. State, supra, 276 S.E.2d at 19.

2. Petitioner filed a "Motion for Change of Venue," R. 5, and argued that the prejudicial pre-trial publicity necessitated a venue change to protect petitioner's constitutional right to a fair trial by an impartial jury. R. 6. After a pre-trial hearing on the Motion, the trial court denied the Motion. Venue Change Hearing 104; see R. 47. Petitioner subsequently filed a "Renewed Motion for Change of Venue," R. 37, submitting evidence of more recent newspaper articles concerning the case and arguing that the denial of the request for a venue change violated petitioner's right to a fair trial. R. 39.

On appeal to the Supreme Court of Georgia, petitioner argued that the trial court's denial of a venue change violated his right to a fair trial. See Brief of Appellant at 18. The Georgia Supreme Court rejected this claim, emphasizing that all but four of the venirepersons stated that they would be able to "put aside any prejudice arising out of the pre-trial publicity and render a verdict based on the evidence." Messer v. State, supra, 276 S.E.2d at 21.

3. During trial, immediately after the outburst by Rhonda Tanner's father, petitioner's counsel moved for a mistrial based on the outburst. T. 372. Counsel argued that the outburst would necessarily prejudice the minds of the jurors and impermissibly inject passion into the jury's decisionmaking. T. 377-78. After instructing the jury to disregard the outburst, T. 379, and asking whether any juror would be unable to do so and receiving no response from the jury, id.,the trial court denied petitioner's request for a mistrial. T. 382-83.

Subsequent to the conviction and sentencing, petitioner's counsel filed a Motion for a New Trial, and argued that the trial court erred in failing to grant the mistrial. R. 86-87. After an evidentiary hearing on this matter, the trial court denied the Motion for a New Trial. R. 102-03.

On appeal to the Supreme Court of Georgia, petitioner argued that the father's outburst improperly introduced passion and emotion into the jury's determination of guilt and capital sentencing decision. Brief of Appellant 21-23. The Georgia Supreme Court rejected this contention, holding that "[m]easures to be taken as a result of demonstrations and outbursts which occur during the course of a trial are matters within the trial court's discretion," Messer v. State, supra, 276 S.E.2d at 22-23, and concluding that the denial of petitioner's motion did not constitute an abuse of discretion in that the trial court instructed the jurors to disregard the outburst and thoroughly questioned them at trial and at the Hearing on the Motion for New Trial whether the outburst affected them. Id. at 23.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DENIAL OF STATE-PAID INDEPENDENT PSYCHIATRIC SERVICES VIOLATED THE SIXTH AMENDMENT OR THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

Although this Court has not as yet ruled on the question of an indigent defendant's constitutional right to State-paid expert assistance, several lower courts have concluded that indigent defendants are entitled to such services, both under the equal protection clause of the Fourteenth Amendment (Williams v. Martin, 618 F.2d 1021, 1027 (4th Cir. 1980); Jacobs v. United States, 350 F.2d 571, 573 (4th Cir. 1965)), and in order to satisfy the Fourteenth Amendment's requirement of fundamental fairness and the Sixth Amendment's requirement of effective assistance of counsel (Williams v. Martin, supra, 618 F.2d at 1027; Bush v. McCollum, 231 F. Supp. 560, 565 (N.D. Tex. 1964), aff'd.,344 F.2d 672 (5th Cir. 1965); cf. Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975)(right to State-paid investigative services)). See also Gibson v. Jackson, 443 F. Supp. 239, 250 (M.D. Ga. 1977), vacated and remanded on other grounds, 578 F.2d 1045, 1054-55 (5th Cir.), cert. denied, 439 U.S. 1119 (1978) (constitutional right to access to the courts confers entitlement to State-paid expert services in state habeas corpus proceedings). These conclusions of the lower courts are consistent with this Court's declaration that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," Griffin v. Illinois, 351 U.S. 12, 19 (1965), and this Court's conclusion that a criminal defendant's inability to marshal the information necessary to present his version of the facts smacks of fundamental unfairness, see Argersinger v. Hamlin, 407 U.S. 25,

31-33 (1972); Gideon v. Wainwright, 372 U.S. 355 (1964). Cf. Little v. Streater, ___U.S. ___, 49 U.S.L.W. 4581 (U.S., June 2, 1981).

In the present case, petitioner's counsel sought a State-paid independent psychiatric examination for the expressly avowed purpose of presenting a defense of incompetency to stand trial, R. 21-22; Insanity Plea Hearing 3, and as the record indicates, counsel apparently also contemplated presenting an insanity defense at trial, see R. 114. Counsel affirmed "on information and belief that certain psychiatric problems will arise during the course of the preparation and defense of this case," R. 22, and, as counsel subsequently pointed out in his Comments to the Report of the Trial Judge, the dramatic inconsistency between the crime with which petitioner was charged and his prior history certainly suggested some questions regarding the petitioner's sanity.[4/] In requesting

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4/ In denying petitioner's request for independent psychiatric assistance in preparing an incompetency defense, the trial court stated that counsel had not provided a sufficient showing of evidence of psychiatric problems to justify such assistance. Insanity Plea Hearing 9. Yet the same lack of funds that necessitated petitioner's request also precluded him from gathering psychiatric evidence in support of the Motion. See Williams v. Martin, supra, 618 F.2d at 1026-27 ("An indigent prisoner who needs expert assistance because the subject matter is beyond the comprehension of laymen should not be required to present proof of what an expert would say when he is denied access to an expert.") Moreover, the evidence available to the trial court apparently raised sufficient questions in the court's mind concerning the petitioner's sanity to cause the trial court to initially indicate that it was leaning in favor of granting petitioner's request, see Insanity Plea Hearing 4-5, and then even after denying the request, order a second psychiatric examination at the State Hospital, R. 30.

In denying any psychiatric examinations for the purpose of establishing insanity at the time of the offense, the trial court relied on the very different conclusion that an examination conducted ten months after the offense could not shed any new light on the earlier State Hospital evaluation of petitioner's "mental condition at the time of the alleged offense." Insanity Plea Hearing 9. Yet, the very function of the forensic psychiatrist is to assess the mental state of a criminal defendant on a date in the past. While the lapse of ten months would certainly provide a basis for prosecution cross-examination of a psychiatrist's conclusions and arguments as to the weight and value of those conclusions, it would not provide a basis for a judge totally precluding the defendant from receiving the expert advice and assistance to which he is constitutionally entitled.

an independent psychiatric examination, petitioner sought the type of "professional assistance that would have been available to a person who could afford his own defense." Williams v. Martin, supra, 618 F.2d at 1027. Yet,the trial court denied the petitioner's request and limited counsel to the two psychiatric examinations performed at the Georgia Central State Hospital on different dates by the same psychiatrist.

A court-ordered psychiatric examination by a State Hospital psychiatrist can hardly be deemed sufficient to satisfy the constitutional requirements governing this area of the law. As the lower courts have concluded, even an ostensibly neutral State psychiatrist conducting an apparently neutral examination may in fact be an adversarial proponent of the interests of the State. Jacobs v. United States, supra, 350 F.2d at 573; see Thornton v. Corcoran, 407 F.2d 695, 699 (D.C. Cir. 1969); cf. Bush v. McCollum, supra, 231 F. Supp. at 565 (implicitly ruling that the psychiatric examinations performed at the State Hospital could not suffice to satisfy the defendant's right to psychiatric assistance); see also Williams v. Martin, supra, 618 F.2d at 1026-27 (results of autopsy performed by state medical examiner who testified for the government was not sufficient to satisfy defendant's right to expert assistance). Commentators have similarly pointed out that clinical observations frequently reflect the professional orientation of the doctor as much as any objective factor, and that psychiatrists employed by the government are unavoidably influenced by that status. Diamond, "The Psychiatrist As Advocate," 1 J. Psych. & Law 5, 13-17 (1973); Fitzgerald, Pezke & Goodwin, "Competency Evaluations in Connecticut," 29 Hosp. & Comm. Psych. 450, 452 (1978).

Accordingly, the Court should grant certiorari to determine whether the petitioner should have been permitted to procure the type of independent psychiatric examination that would have been available to an individual who could

afford to pay for his own defense, and that was necessary to ensure fundamental fairness and effective assistance of counsel.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DEPRIVED OF AN IMPARTIAL JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OR SUBJECTED TO A CAPITAL SENTENCING DECISION SO INFECTED BY PASSION AND EMOTION AS TO VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS

A. Petitioner Was Unconstitutionally Convicted and Sentenced to Death By A Jury That Was Biased By Pre-Trial Publicity

As a result of the trial court's rejection of petitioner's Motion for Change of Venue, petitioner was unconstitutionally denied a fair trial by an impartial jury and deprived of his life without due process of law. Where the pre-trial publicity in a case is such that there is a "reasonable likelihood" of prejudice (Sheppard v. Maxwell, 384 U.S. 33, 363 (1966)), a change of venue (or some equally effective safeguard) is necessary to protect the defendant's right to a fair trial under the due process clause to the Fourteenth Amendment. Sheppard v. Maxwell, supra, 384 U.S. at 350-52, 363; Irvin v. Dowd, 366 U.S. 717, 728 (1961)("With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ."); Groppi v. Wisconsin , 400 U.S. 505, 508-11 (1971).

The circumstances of the present case include several of the factors that have led the Court in other cases to determine that pre-trial publicity precluded a fair trial. The media coverage in this case was "inflammatory" like the publicity in Sheppard v. Maxwell, supra, and Irvin v. Dowd, supra, rather than "factual in nature" as in Murphy v. Florida, 421 U.S. 794, 802 (1975); the newspaper accounts in this case emphasized the personal loss of the slain girl's parents and

the tragedy to the entire town, and included photographs of the girl's mother weeping by the grave, and the father sitting with another of his young children on his lap. One newspaper article featured side-by-side photographs of the petitioner and the slain girl accompanying an account of the community's funeral fund, while another article quoted a relative of the slain girl saying "[H]e's gotta be killed and I want to be the one to do it." As in Sheppard v. Maxwell, supra, 384 U.S. at 359, the newspaper accounts contained extensive information concerning the testimony of a prospective witness -- the newspaper quoted at length the statements of Principal Samuel Brabson, a key identification witness -- and, as in Irvin v. Dowd, supra, 366 U.S. at 725-26, the articles contained police officers' statements disclosing that petitioner had confessed to committing the offense. As in Maine v. Superior Court, 68 Cal.2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968), there was a community fund for the parents of the victim (the existence of which was widely publicized by the media), which indicates a "pervasive civic involvement in the fate of a victim, particularly when the events all transpire in a relatively small community, [and] is a strong indication that the venue should be changed." Id. at ___, 438 P.2d at 379, 66 Cal. Rptr. at 731.

This case can be easily distinguished from Murphy v. Florida, 421 U.S. 794 (1975), where the Court concluded that the pre-trial publicity did not necessitate a change of venue. In Murphy, the publicity predated the trial by seven months, id. at 802, and "[s]ome of the jurors had a vague recollection of the robbery with which petitioner was charged." Id. at 800. In contrast, the publicity in this case extended from the time of the offense right up to the time of trial (see R. 54-58), and all but one of the forty-eight venirepersons acknowledged learning of the facts of the offense from newspaper,

radio, or television accounts or from conversations in the community.[5/] The testimony in the hearing on the Motion to Change Venue and the voir dire showed that this case was actively discussed in the community and aroused strong feelings among the citizens. In the course of voir dire, four persons had to be disqualified because they had formed unshakeable opinions about the case or otherwise could not be impartial in judging petitioner, at least three other jurors admitting that the publicity could have an effect on their decisionmaking, and four persons acknowledged that they had contributed to the funeral fund for the victim.

Under these circumstances, a change of venue was necessary, and the trial court's refusal to grant such a venue change denied the petitioner a fair trial by an impartial jury, and deprived him of his life without due process of law.

5/ In rejecting petitioner's claim, the Georgia Supreme Court emphasized that the majority of the venirepersons stated that they would be able to "put aside any prejudice arising out of the pre-trial publicity and render a verdict based on the evidence." Messer v. State, supra, 276 S.E.2d at 21. However, as this Court has recognized, even in cases in which a "juror was sincere when he said that he would be fair and impartial to a petitioner, . . . psychological impact requiring such a declaration before one's fellows is often its father." Irvin v. Dowd, supra, 366 U.S. at 728.

B. The Trial Court's Failure to Grant A Mistrial After An Outburst By The Victim's Father Subjected Petitioner To A Capital Sentencing Decision Unconstitutionally Infected By Passion And Emotion

As this Court has repeatedly declared, both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require that the decision to impose a sentence of death must be a reasoned and rational determination and not the product of passion or emotion. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld Georgia's death penalty statute against Eighth Amendment challenge in part because of the express statutory mandate that the state supreme court review every death sentence to determine whether it "was imposed under the influence of passion, prejudice, or any other arbitrary factor." Ga. Code Ann. § 27-2537(c)(1); see Gregg v. Georgia, supra, 428 U.S. at 198. In Gardner v. Florida, 430 U.S. 349, 358 (1977), the Court stressed that:

> It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

The Court reiterated this principle in Godfrey v. Georgia, 446 U.S. 420 (1980), in which the Court reversed a death sentence which could not be said to be "based on reason rather than caprice or emotion.'" Id. In earlier capital cases, the Court similarly paid careful heed to the constitutional concern that the decision to extinguish the life of an individual must not be the product of passion or emotion. See, e.g., Irvin v. Dowd, 366 U.S. 717, 728 (1961); Moore v. Dempsey, 261 U.S. 86, 91 (1923)(due process prohibits deprivation of an accused's life where "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion.")

Although the Court has not as yet defined the parameters of this constitutional protection against death sentences based upon passion and emotion, the present case rather obviously demands its application. When, as in this case, the victim is a young girl (a matter which itself is likely to arouse strong feelings), and the father of the slain girl gets up in the midst of trial and lunges toward the defendant, shouting "You're liable . . . You'll pay . . . you're going to get it," it is inevitable that this incident will affect the jury's decisionmaking. As one of the jurors commented, "it just excites anybody for somebody to jump up and have an outburst and a couple of people carry you off." The record amply demonstrated that the outburst had such an effect. One of the jurors was so upset by the outburst that the other jurors had to calm her down. Another juror recalled that it was "fright" and a "shock." The record moreover reveals that the jurors all discussed the incident immediately after it occurred, and most significant of all, one of the jurors expressed sympathy for the father.

It can hardly be contended that the trial court's cautionary instruction sufficed to counter the emotional impact of the father's outburst. As Mr. Justice Jackson observed in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 453 (1949), profoundly prejudicial effects are rarely overcome by cautionary instructions. The efficacy of an instruction must be particularly doubted in a case such as this, where the instruction did not immediately follow the prejudicial incident and the jury had time to reflect on and discuss the incident before they were instructed.

Under these circumstances, the trial court's refusal to grant a mistrial violated the Eighth and Fourteenth Amendments, for it simply cannot be said that the ensuing sentence of death

both is "and appear[s] to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra, 430 U.S. at 358; Godfrey v. Georgia, supra, 446 U.S. at 433.

C. The Pre-Trial Publicity And The Outburst Of The Victim's Father Had A Cumulative Effect Upon The Jury, Rendering Impossible A Fair Trial And A Capital Sentencing Decision Based on Reason Rather Than Passion And Emotion

As the discussion has already shown, the pre-trial publicity and the father's emotional outburst each in and of itself prejudiced the proceedings in this case and violated constitutional rights of the petitioner. The existence of both of these factors in the same case had the effect of accentuating the prejudice and unconstitutional effect of each factor.

The pre-trial publicity in this case emphasized the personal tragedy of the slain girl's parents, both in the context of the articles and in accompanying photographs of the father holding another of his young children and the mother weeping by the grave. Moreover, the media accounts linked the personal loss of the parents to the tragedy for the entire community, and widely publicized the funeral fund gathered by the community for the parents.

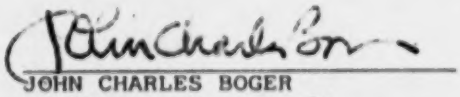
When Rhonda Tanner's father got up in court and lunged towards the defendant, shouting "You're liable . . . You'll pay . . . you're going to get it," the jurors could not help but recall the media reports concerning the parents of Rhonda Tanner. In this manner, the outburst brought the publicity back to the fore of the jurors' minds, and reinforced any prejudicial effects of the publicity by visibly demonstrating the very thing the articles had described: the agony of the slain girl's parents.

As the Court declared in Mattox v. United States, 146 U.S. 140, 149 (1892), "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." In this case, there were not just one but two such external causes, which combined to unconstitutionally deprive petitioner of a fair trial and a capital sentencing decision based on reason rather than passion and emotion.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

MESSER

v.

The STATE.

No. 36936.

Supreme Court of Georgia.

March 3, 1981.

Defendant was convicted before the Superior Court, Polk County, Dan Winn, J., of murder and kidnapping with bodily injury and was sentenced to death, and he appealed. The Supreme Court, Gregory, J., held that: (1) trial court did not err in admitting defendant's confession; (2) in-court identifications by two witnesses were not tainted by impermissibly suggestive prior photographic display and display did not deprive defendant of his Sixth Amendment right to counsel; (3) trial court did not err in failing to grant defendant's motion for change of venue based on excessive, adverse pretrial publicity; (4) trial court did not err in failing to grant defendant's motion for mistrial after victim's father lunged toward defendant screaming that defendant would "pay"; and (5) defendant's sentence to death for murder was not excessive or disproportionate to penalty imposed in similar cases.

Judgment affirmed.

1. Criminal Law ⇐1148
Mental Health ⇐434

The grant or denial of motion for independent psychiatric evaluation lies within discretion of trial court and will not be overturned unless an abuse of discretion is shown.

2. Mental Health ⇐434

In prosecution for murder and kidnapping with bodily injury, trial court did not abuse discretion in denying defendant an independent psychiatric examination at government expense after two psychiatric examinations concluded that defendant was competent to stand trial.

3. Criminal Law ⇐518(1)

Even if defendant could show that he was the only suspect under investigation, law does not require law enforcement officials to inform suspect that they are focusing their investigation on him alone before obtaining confession.

4. Criminal Law ⇐519(3)

Where law enforcement officers testified that defendant voluntarily accompanied them to police station for questioning, defendant was informed of his *Miranda* rights and signed waiver form prior to any questioning, after defendant confessed to crime, officers placed him under arrest and reminded him of his *Miranda* warnings, defendant never requested an attorney and never asked for the interview to cease and defendant was not under influence of alcohol or drugs during the interview, trial court did not err in admitting defendant's confession to the murder of his niece, even though law enforcement officials did not advise him that he was the sole suspect in the case during interview.

5. Criminal Law ⇐414

The state is required only to prove by a preponderance of evidence that the defendant's statement was voluntarily made.

6. Criminal Law ⇐1169.1(5)

Each case must be considered on its facts and convictions based on eyewitness identification will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

7. Criminal Law ⇐339.11(1)

Only if the court determines that the identification procedure of defendant was impermissibly suggestive, need it decide whether there was a substantial likelihood of irreparable misidentification.

8. Constitutional Law ⇐266(3.2)

In considering whether there has been a violation of a defendant's right to due process, court must look to totality of surrounding circumstances and determine

whether the identification was reliable even though the confrontation procedure may have been suggestive. U.S.C.A.Const. Amend. 14.

9. Criminal Law ⇐339.10(8)

Where two witnesses were asked only to identify the man who had picked up murder victim at school and who had been present on date of victim's death in electrical supply store, identification testimony based on the photographs of defendant shown to witnesses was allowed for these limited purposes and the in-court identification of defendant by the two witnesses had an independent basis in that both witnesses had had opportunity to closely examine defendant in daylight for several minutes, identification procedure was not impermissibly suggestive so as to taint in-court identifications.

10. Criminal Law ⇐339.7(2)

Photographic display including defendant's photograph along with five other white males with facial characteristics similar to those of defendant did not deprive defendant of his Sixth Amendment right to counsel, where defendant had been informed of his right to counsel and did not request assistance of counsel. U.S.C.A. Const. Amend. 6.

11. Criminal Law ⇐134(4)

Where only four out of the majority of 48 prospective jurors who stated that they had been exposed to varying amounts of publicity surrounding murder for which defendant was on trial stated that they would not be able to put aside any prejudice arising out of pretrial publicity and render a verdict based on the evidence and those four jurors were excused by the court, defendant, claiming that trial court erred in failing to grant his motion for change of venue, failed to show that a pattern of deep and bitter prejudice created by pretrial publicity was present throughout the community and was reflected in the verdict reached by the jurors who tried him.

12. Jury ⇐131(13)

Where trial court permitted defense counsel to thoroughly examine each of the prospective jurors and defense counsel did not demonstrate how presence of other jurors impeded defense counsel's ability to examine any individual juror nor that any juror tended to parrot the responses made by fellow jurors, trial court did not abuse discretion in refusing to permit individual voir dire outside the presence of the other jurors.

13. Criminal Law ⇐659

Where, after victim's father lunged at defendant who was on trial for the kidnapping and murder of father's daughter, father was immediately removed from the courtroom, trial court sent jury out of courtroom as soon as disturbance began, jurors were instructed on two occasions not to let outburst interfere with their responsibilities as jurors, and, on motion for new trial, each juror was thoroughly questioned as to whether outburst affected his decision, trial court did not abuse discretion in denying defendant's motion for mistrial on asserted ground that disturbance denied him a fair trial.

14. Criminal Law ⇐659

Measures to be taken as result of demonstrations and outbursts which occur during the course of trial are matters within the trial court's discretion unless a new trial is necessary to insure a fair trial.

15. Criminal Law ⇐659

Where the trial court fails to stop a disturbance, or fails to instruct the jury to disregard it, and the demonstration will prevent the defendant from receiving a fair trial, the court must grant a new trial.

16. Criminal Law ⇐1206(2)
Homicide ⇐354

Since evidence factually substantiated finding of guilt beyond a reasonable doubt of charges of murder and kidnapping with bodily injury, evidence supported finding that murder was committed while defendant was engaged in capital felony of kidnapping with bodily injury and record showed that defendant molested victim, his eight-year-old niece, stabbed her to silence her cries, continued to beat and kick victim

until she remained motionless, and abandoned victim to bleed to death, defendant's sentence to death was not excessive or disproportionate to penalty imposed in similar cases. Code, §§ 27-2534.1(b)(2, 7), 27-2537(c)(1-3).

John E. Sawhill, III, Rome, for James E. Messer, Jr.

W. A. Foster, III, Dist. Atty., Cedartown, Arthur K. Bolton, Atty. Gen., for the State.

GREGORY, Justice.

This is a death case. The defendant was convicted of the murder and kidnapping with bodily injury of his eight year old niece. The jury fixed the defendant's punishment as death for the murder, finding as the aggravating circumstances that the offense of murder was committed while the offender was engaged in the capital felony of kidnapping with bodily injury (Code Ann. § 27-2534.1(b)(2)), and that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim (Code Ann. § 27-2534.1(b)(7)). The jury found that the kidnapping with bodily injury was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim and an aggravated battery to the victim and sentenced the defendant to death for this offense. Code Ann. § 27-2534.1(b)(7).

The jury was authorized to make the following findings of fact:

On February 13, 1979, the date of the murder, the defendant left his home to attend a doctor's appointment. He waited at the doctor's office briefly, then departed before the time for his appointment arrived. Around mid-day he went to an electrical supply store. There he told the saleswoman that he worked for a construction company in Rome and needed a specialized light fixture. After inspecting the light fixtures on display in the store he appeared dissatisfied, and told her that he wanted to look at "more stuff . . . that will probably be in the back." The saleswoman invited him to examine the light fixtures in the supply room, located at the back of the store, but informed him that she could not assist him as she was alone in the store and needed to supervise the unloading of a delivery truck that had just arrived. When the defendant persisted in his requests that the saleswoman assist him in the back of the store, she became nervous. Suspecting the defendant's motives, the saleswoman telephoned her husband, who worked nearby, and asked him to come to her assistance. During this period of time the defendant did not venture into the supply room. When the defendant saw the saleswoman's husband enter the store, he left. The saleswoman testified that she observed the defendant shake his head and mouth the word "damn" as he left.

At trial the saleswoman testified that she had seen defendant in the store three months prior to this incident. At that time he had also attempted, unsuccessfully, to get her to go into the back room of the store to look for a specialized item.

Around 2:30 that afternoon the saleswoman saw the defendant drive slowly by the electrical supply store. She ran out into the street and took down his license plate number. The saleswoman testified that she watched the defendant turn in the direction of College Street Elementary School which is located a few blocks from the electrical supply store. That night she and her husband telephoned the police to report this suspicious incident and to request that the police investigate the defendant. The following night the police asked the couple to examine photographs at the police station to see if they could identify the man. Both selected a picture of the defendant. The license plate number taken down by the saleswoman matched the license number of defendant's car.

On the date of her death the victim was attending College Street Elementary School. The victim's teacher testified at trial that the victim had an "uneasy, nervous" nature which had complicated her adjustment to school routine. The victim apparently cried most of the day, had difficulty socializing with other children, and fre-

quently voiced her fear that her mother would desert her and that she would be left alone at home after school. At 2:30 that afternoon the victim was preparing to board the school bus that would take her home when the principal called the victim's homeroom to say that her uncle, the defendant, was there to take her home. The defendant had informed the principal that the victim's father had been injured on a construction job and that the victim's mother, too upset to drive herself, had requested that the defendant pick the victim up at school. When the victim saw her uncle she ran up to him and, according to an observer, began "prancing around him." The principal testified that the victim took the defendant's hand and "petted" it. The victim excitedly told her teacher that she would not have to ride the bus as her uncle would take her home. Subsequently the victim and the defendant left the school together. The principal later identified a police photograph of the defendant as the man who had picked up the victim.

Between 2:45 and 3:00 that afternoon the victim's mother arrived at the school, alarmed that the victim had not come home on the schoolbus. The mother denied authorizing the victim's uncle, or anyone else, to pick her up. The victim's mother testified that the principal's description of the man "fit [the defendant] to a 'T'." The victim's mother telephoned the defendant's wife to see if the child was at their home as the defendant and his wife frequently babysat for the victim. Defendant's wife told her that she had not seen the victim that day and that the defendant had gone to the doctor.

At trial a witness testified that at about 3:30 that afternoon she observed the defendant walking away from the woods where the victim's body was later found.

Arriving home the defendant spoke at length to his family about his long and futile wait at the doctor's office. When informed of the victim's abduction, defendant told the victim's family that he had seen a child resembling the victim in a "dark colored car ... headed north," but that he otherwise knew nothing of the circumstances surrounding her absence.

The following day the victim's family conducted an extensive search for the child. A sister-in-law of defendant, driving by the wooded area where defendant had taken the victim, spotted the victim's coat. A police search ensued and subsequently the victim's book and crayons were found. Further search uncovered the body of the victim, clad only in a knit shirt.

The victim had been stabbed numerous times in the chest and abdomen. Her face had been so severely beaten that it was not readily recognizable. Her abdomen had been slashed five times by a knife, and bruises and lacerations covered her face, neck and upper chest. Spermatozoa were found in the victim's vaginal area, but there was no evidence to indicate that she had been raped. Autopsy results showed that she had bled to death.

That night the defendant and his wife voluntarily accompanied GBI agents to the police station for questioning. Although not under arrest at that time, the defendant was given *Miranda* warnings and subsequently signed a waiver form. After being confronted with the fact that he had been identified as the person who removed the victim from school, the defendant confessed to the murder of his niece. A GBI agent testified that defendant told him "after not getting anywhere ... with the female employee" at the electrical supply store, "the first thing that came to his mind was [the victim] and that's why he went to the school to get her." The defendant stated that he had driven the victim to a wooded area and parked the car. He told her that he was having trouble with the battery cables in his car and needed to find a rock to fix them. She accompanied him into the woods to search for a rock.

Telling her that he "wanted to play a game with her" the defendant pushed the victim down to the ground, removed her slacks and began touching her "between the legs." The defendant repeatedly stated to the GBI agents that he had originally intended to "just molest" the victim and to

"make her promise not to tell her father," but that the victim refused to cooperate with him and began to scream. He stated that he hit her repeatedly with his fist to quiet her. He masturbated on the left side of the victim's abdomen and finally stabbed her with his pocketknife to silence her. The defendant then kicked the victim in the face until she lay motionless. The defendant told the agents that he washed his pocketknife in a nearby stream, then returned to his parked car where he removed the victim's coat, book and crayons and threw them into the woods.

After the defendant confessed to the crime, he was placed under arrest and reminded of his *Miranda* warnings. The police accompanied defendant to a nearby hospital where blood samples and hair specimen were taken. Expert testimony presented at trial established that the hair found on the shirt and pants defendant had been wearing on the day of the murder belonged to the victim. The shoes defendant had been wearing at that time corresponded to the plaster cast of a partial shoe track found at the scene of the crime. Traces of blood were found on defendant's pocketknife, but were of an amount too small to type.

(1) Defendant first contends that the trial court erred in failing to grant his motion for an independent psychiatric examination at government expense.

In March, 1979 the defendant underwent a psychiatric examination at Central State Hospital. It was determined at that time that he was competent to stand trial. An indictment was returned against defendant in November, 1979. The following month defendant entered a special plea of insanity and simultaneously made a motion for independent psychiatric evaluation, stating that, without it, he would be unable to adequately prepare his defense. The trial court denied the motion, finding that the defendant had not shown sufficient grounds in support of his motion. Defendant's motion for reconsideration was also denied, but the trial court ordered that defendant should be returned to the state facility at Milledgeville for further examination to determine his competency to stand trial. The second report stated that defendant was competent to stand trial. Subsequently defendant withdrew his special plea of insanity.

[1, 2] The grant or denial of a motion for independent psychiatric evaluation lies within the discretion of the trial court and will not be overturned unless an abuse of discretion is shown. *Dampier v. The State*, 245 Ga. 427, 265 S.E.2d 565 (1980); *Leggett v. The State*, 244 Ga. 226, 259 S.E.2d 476 (1979). We find no abuse of discretion in denying an independent psychiatric examination in this case.

(2) In his second enumeration of error defendant urges that the trial court erred in failing to exclude his confession. Defendant avers that the circumstances surrounding his confession were tainted by the fact that law enforcement officials did not advise him that he was the "sole suspect" in the case. Defendant relies on *Windsor v. United States*, 389 F.2d 530 (5th Cir. 1969) in support of his contention that law enforcement officials were required to inform him that they were focusing their investigation on him alone. However, *Windsor* requires only that when the general inquiry into a crime "begins to focus on a particular suspect," *Miranda* warnings must be given to that suspect. *Miranda* warnings were, in fact, given to the defendant in this case before the interview began.

[3] There was some conflict in the testimony of the interviewing officers as to whether the defendant was the "sole suspect." Even if the defendant could show that he was the only suspect, the law does not require law enforcement officials to inform a suspect that they are focusing their investigation on him alone.

[4] The trial court conducted a *Jackson v. Denno* hearing outside the presence of the jury before admitting defendant's confession into evidence. See 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1963). At this hearing GBI agents testified that, although the defendant had asked to postpone the interview until after the victim's funeral,

he had voluntarily accompanied them to the police station for questioning. Once there, the interviewing officers advised the defendant that he was not under arrest and was free to leave at any time. The defendant was informed of his *Miranda* rights and signed a waiver form prior to any questioning. After defendant confessed to the crime, officers placed him under arrest and reminded him of his *Miranda* warnings. The interviewing agents testified at the *Jackson v. Denno* hearing that the defendant never requested an attorney; that he never asked for the interview to cease; and that he was not under the influence of any type of alcohol or drugs. The defendant did not testify at the *Jackson v. Denno* hearing. The trial court ruled that the defendant had voluntarily confessed to the crime and admitted the confession into evidence.

At the close of all the evidence the trial court charged the jury that they must make an independent determination that defendant's confession was voluntarily made before they considered it.

[5] The State is required only to prove by a preponderance of the evidence that the [defendant's] statement was voluntarily made. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1971); *Pierce v. State*, 235 Ga. 237, 219 S.E.2d 158 (1975). The trial court determined that the State met that burden in this case. "Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal." *Crawford v. State*, 245 Ga. 89, 263 S.E.2d 131 (1980); *United States v. Watson*, 469 F.2d 362, 365 (5th Cir. 1972). See also, *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980); *Tyler v. The State*, — Ga. —, 274 S.E.2d 549 (1981).

We have carefully reviewed the record and conclude that the trial court did not err in admitting defendant's confession.

(3) Defendant argues that the in-court identifications by two witnesses were tainted by a prior photographic display and should have been excluded by the trial court.

After accompanying law enforcement officers to police headquarters, defendant consented to have his photograph taken. Defendant's photograph, along with photographs of five other white males with facial characteristics similar to those of defendant, were subsequently shown to the principal of the victim's elementary school and to the saleswoman at the electrical supply store. The principal selected the photograph of the defendant as the person who had removed the victim from school on the date of her death. The saleswoman identified the photograph of defendant as the man who had raised her suspicions in the electrical supply store.

[6] "We hold that each case must be considered on its facts, and that convictions based on eyewitness identification will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968).

[7, 8] Thus *Simmons* outlines a two part test: first the court must determine whether the identification procedure was impermissibly suggestive. Only if the court determines that it was, need it decide whether there was a substantial likelihood of irreparable misidentification. *McClesky v. State*, 245 Ga. 108, 263 S.E.2d 146 (1980); *Gravitt v. State*, 239 Ga. 709, 239 S.E.2d 149 (1977). In considering whether there has been a violation of a defendant's right to due process, the court must look to the totality of the surrounding circumstances and determine whether the identification was reliable even though the confrontation procedure may have been suggestive. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

[9] The defendant in this case has pointed to no particularities of circumstance which would have rendered the photographic identification impermissibly suggestive.

Upon examination of the record we conclude that there is no evidence that the photographic identification method used by police was impermissibly suggestive. The witnesses were asked only to identify the man who had picked up the victim at school and who had been present on the date of the victim's death in the electrical supply store. The identification testimony based on the photographs was allowed for these limited purposes. Furthermore, the in-court identification of defendant by these two witnesses had an independent basis. Both witnesses had had the opportunity to closely examine the defendant in daylight for several minutes.

[10] Defendant also urges that the impermissible photographic display deprived him of his Sixth Amendment right to counsel. However, the record is clear that defendant was informed of his right to counsel when he was given *Miranda* warnings, but that he never requested an attorney.

Therefore, we find this argument to be without merit.

[11] (4) Defendant argues that the trial court erred in failing to grant his motion for a change of venue based on excessive, adverse pre-trial publicity.

"The test as to whether pre-trial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such publicity." *Dampier v. The State*, supra, at 431, 265 S.E.2d 565. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1960).

The majority of the 48 prospective jurors examined in this case stated that they had been exposed to varying amounts of publicity surrounding the crime. However, only four stated that they would not be able to put aside any prejudice arising out of the pre-trial publicity and render a verdict based on the evidence. These four jurors were excused by the court. This low percentage of veniremen excused for prejudice (approximately 8.3 per cent) corroborates the absence of such prejudicial publicity as would require the grant of a motion for a change of venue.[1] *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1974); *Dick v. The State*, 246 Ga. 697, 273 S.E.2d 124 case No. 36220, decided November 5, 1980 (10 per cent dismissal rate corroborates absence of prejudicial bias); *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980) (5 per cent dismissal rate corroborates absence of prejudicial bias); *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979) (20 per cent dismissal rate corroborates absence of prejudicial bias); *Coleman v. State*, 237 Ga. 84, 226 S.E.2d 911 (1976) (49 per cent dismissal rate corroborates absence of prejudicial bias); *Butler v. State*, 231 Ga. 276, 201 S.E.2d 448 (1973) cert. den. 420 U.S. 907, 95 S.Ct. 825, 42 L.Ed.2d 836 (1974) (36 per cent dismissal rate corroborates absence of prejudicial community bias); cf. *Irvin v. Dowd*, supra (62 per cent corroborates actual jury partiality).

The defendant has failed to show that a "pattern of deep and bitter prejudice" created by the pre-trial publicity was "present throughout the community" and was reflected in the verdict reached by the jurors who tried him. *Irvin v. Dowd*, supra, at 727, 81 S.Ct. at 1645. Therefore, there is no merit to this argument.

[12] (5) The defendant next cites as error the trial court's refusal to permit the sequestration of jurors during individual voir. Defendant argues that jurors "in sympathy with the victim's family" would tend to merely parrot the responses they heard from other jurors.

1. To the extent these percentages reflect a pattern of prejudice existing throughout the community, they are significant. To arrive at the percentage, divide the number of veniremen excused for prejudice by the total number of veniremen questioned.

"Code Ann. § 59-705 gives defense counsel the right to examine jurors individually after the usual voir dire questions have been put by the trial court to one jury as a panel. The right does not encompass isolated examination. The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. The control of the pursuit of such determination is within the sound legal discretion of the trial court, and only in the event of manifest abuse will be upset upon review." *Whitlock v. State*, 230 Ga. 700, 705-6, 198 S.E.2d 865 (1973). See also, *Finney v. State*, 242 Ga. 582, 250 S.E.2d 388 (1978).

In this case the trial court permitted defense counsel to thoroughly examine each of the prospective jurors. Defense counsel has not demonstrated to this court how the presence of other jurors impeded his ability to examine any individual juror. Nor has he shown that any juror did tend to parrot the responses made by fellow jurors.

We conclude that the trial court did not abuse its discretion in refusing to permit individual voir dire outside the presence of the other jurors.

[13] (6) Last, defendant argues that the trial court erred in failing to grant his motion for a mistrial.

During the direct examination of one of the GBI agents who had interviewed the defendant, the agent testified that defendant stated to him that he had not attempted sexual intercourse with the victim "because he didn't want to hurt her."

The record shows that at this juncture the victim's father "lunged" toward the defendant, screaming, "He ... He'll pay. You're liable ... you'll pay. You'll pay. You're liable. Oh! What you think ... oh you ... you're going to get it ... you."

The trial court immediately sent the jury to the jury room and the victim's father was removed from the courtroom by a state trooper. At this time the defendant moved for a mistrial. The trial court deferred ruling on the motion until the jury had been instructed concerning the outburst. The court instructed the jury that the victim's father had been present in the courtroom by agreement between the defense counsel and the State; that the father's outburst should be given no weight in determining the guilt or innocence of the defendant; that the jury was only to consider physical evidence or sworn testimony in reaching their verdict. The trial court then requested that the jurors be candid and inform the court at that time if they felt the outburst would, in any way, affect their verdict. There was no response from any of the jurors. The defendant renewed his motion for a mistrial which the trial court denied.

Before the trial entered the punishment phase, the trial court again instructed the jury to disregard the outburst and again inquired of the jurors whether the outburst would influence them in deciding on the punishment. There was no response from any of the jurors.

At the hearing on the motion for a new trial defendant presented testimony from one juror who stated that, immediately after the disruption in the courtroom, he had attempted to calm down a female juror who had been made visibly upset by the father's outburst. When questioned by the court, he stated that the outburst had had no influence on him, either in reaching the verdict or in determining punishment. The female juror who had allegedly been upset by the outburst testified that she "wasn't that much upset"; that she was "fine" within a few minutes of returning to the jury room; and that thereafter she "just didn't pay it any attention." She also testified that in no way did the outburst affect her decision as to the verdict or punishment.

At this hearing the court inquired of each juror whether the father's outburst had affected his decision in either the guilt/innocence or punishment phase of the trial. Each juror responded in the negative.

[14, 15] Measures to be taken as a result of demonstrations and outbursts which occur during the course of a trial are matters

within the trial court's discretion unless a new trial is necessary to insure a fair trial. Where the trial court fails to act to stop a disturbance, or fails to instruct the jury to disregard it, and the demonstration will prevent the defendant from receiving a fair trial, the court must grant a new trial. See *Sheppard v. State*, 235 Ga. 89, 91, 218 S.E.2d 830 (1975); *Shy v. State*, 234 Ga. 816 (III), 218 S.E.2d 599 (1975); *Avery v. State*, 209 Ga. 116, 126, 70 S.E.2d 716 (1952).

In this case the trial court sent the jury out of the courtroom as soon as the disturbance began. The offending person was immediately removed from the courtroom. Moreover, the jurors were fully instructed on two occasions to not let the outburst interfere with their responsibilities as jurors. On the hearing of the motion for new trial, each juror was thoroughly questioned as to whether the outburst affected his decision. We cannot say that under these circumstances the trial court abused its discretion in denying defendant's motion for a mistrial.

Sentence Review

[16] In the sentence review of this case we have considered the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant. We have reviewed the sentence as required by Georgia Law 1973, p. 159 et seq.; Code Ann. § 27-2537(c)(1-3), as we have in each case involving the death penalty under this statute. We find that the evidence factually substantiates the verdict and supports the finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

After reviewing the record in this case, we find that the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor. See Division 6, supra.

As to Count 1 of the indictment, the jury found that the murder of the victim was committed while the offender was engaged in another capital felony, to-wit: kidnapping with bodily injury. Code Ann. § 27-2534.1(b)(2), and, in addition, that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim, Code Ann. § 27-2534.1(b)(7). As to Count 2 of the indictment, the jury found that the offense of kidnapping with bodily injury was outrageously vile or inhuman in that it involved torture to the victim and aggravated battery to the victim.

We find that the evidence supports the finding that the murder was committed while defendant was engaged in the capital felony of kidnapping with bodily injury. *Pryor v. State*, 238 Ga. 698, 234 S.E.2d 918 (1977).

The record shows that the defendant molested the victim, his eight year old niece, then stabbed her to silence her cries. The defendant continued to beat and kick the victim until she remained motionless. The blows to the victim's head were so forceful that they tore the skin and connective tissue away from her skull. The defendant then abandoned the victim to bleed to death.

By any rational standard the murder and the kidnapping with bodily injury were outrageously and wantonly vile, horrible and inhuman. In that respect this matter is distinguishable from those murders in which the death penalty is not appropriate. *Hance v. State*, supra. *Patrick v. State*, 246 Ga. 417, 265 S.E.2d 553 (1980). The evidence shows that the victim was quite happy to see the defendant at her school. She guilelessly accompanied him into the woods to look for "a rock to fix his car." The victim was totally incapable of defending herself against the defendant's brutal attack. The defendant stabbed and beat the victim, then abandoned her to suffer a horrible death.

In *Hance v. State*, supra, this court set forth those standards which must be met in order to constitutionally apply Code Ann. § 27-2534.1(b)(7) in light of the United States Supreme Court decision of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In *Hance* we held that torture, as the term is used in the statute, occurs when the victim is subjected, as in

this case, to serious physical abuse prior to death. The evidence here supports a finding of serious physical abuse prior to death. Additionally, the evidence supports a finding of an aggravated battery prior to death. *Hance v. State*, supra.

We have thoroughly reviewed the instructions of the trial court during the sentencing phase of the trial and find that the charge is not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978) and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978). Reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or a life sentence was imposed. We find that the following similar cases listed in the appendix supports the affirmance of the death penalty. The appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978); *Griggs v. State*, 241 Ga. 317, 245 S.E.2d 269 (1978); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1978); *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980); *Hill v. State*, 246 Ga. 402, 271 S.E.2d 802 (1980); *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980).

ST. REGIS PAPER COMPANY

v.

Eleanor Davis BROWN et al.

No. 36828.

Supreme Court of Georgia.

March 12, 1981.

Lessors sued lessee seeking judgment declaring void a purchase option contained in two lease agreements. The Superior Court, Stewart County, Blanks, J., granted lessors' motion for summary judgment and lessee appealed. The Court of Appeals, 155 Ga.App. 679, 272 S.E.2d 544, affirmed and certiorari was granted. The Supreme Court, Clarke, J., held that option to purchase, written into lease and exercisable within period of lease, did not violate rule against perpetuities, even though period for exercise extended beyond period specified in the rule.

Reversed.

Smith, J., dissented and filed opinion.

1. Perpetuities ⇐4(1)

Perpetual lease or perpetual right to renew lease does not violate rule against perpetuities.

2. Perpetuities ⇐4(1)

Option to purchase, written into lease and exercisable within period of lease, did not violate rule against perpetuities, even though period for exercise extended beyond period specified in the rule.

Jesse G. Bowles, III, Jesse G. Bowles, Cuthbert, Howell Hollis, Albert W. Stubbs, Columbus, William H. Agnor, Atlanta, John B. Harris, Jr., Mary Mendel Katz, Macon, for St. Regis Paper Co.

Robert M. Margeson, III, Donald D. Rentz, Albany, Edward Wohlwender, Jr., Columbus, Thomas Thorne-Thomsen, G. Conley Ingram, Alston, Miller & Gaines, Atlanta, for Eleanor Davis Brown et al.